COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2004-1998

NATHANIEL LAVALLEE, *et al.*

V.

THE JUSTICES OF THE SPRINGFIELD DISTRICT COURT

MOTION FOR IMMEDIATE RELIEF

Now come petitioners, pursuant to G.L. c.211, §3, and hereby move the Court to enter an order for preliminary relief:

1. Vacating the orders of the Springfield District Court entered on May 5, 2004 denying the petitioners' motions for appointment of counsel;

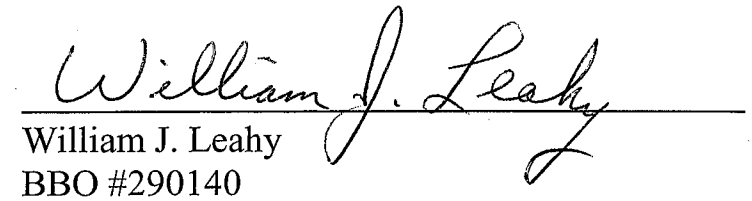
2. Directing the respondents, the Justices of the Springfield District Court, to conduct further hearings for the petitioners and, if the court determines that the petitioner is indigent and has been held in custody for longer than two weeks following arraignment without the appointment of counsel to represent him, to authorize the payment of counsel at a rate higher than that which has been established by the Legislature. The rate of payment which may be authorized pursuant to this paragraph shall be the rate which is necessary to secure representation by counsel for the defendant, but

shall not in any event exceed the rates approved by the Committee for Public Counsel Services.

In support, petitioners submit the accompanying memorandum of law and attachments, and request a hearing.

COMMITTEE FOR PUBLIC COUNSEL SERVICES

By its Chief Counsel,



William J. Leahy
BBO #290140
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212

Dated: May 20, 2004.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2004-1999

MICHAEL CARABELLO, ALBERTO RIVERA, JOEL RODRIGUEZ, DAVID VADDY and LUIS VALLELLANAS,

v.

THE JUSTICES OF THE HOLYOKE DISTRICT COURT

MOTION FOR PRELIMINARY RELIEF

Michael Carabello, Alberto Rivera, Joel Rodriguez, David Vaddy and Luis Vallellanas hereby move the Court to enter a preliminary order:

1. Vacating the orders of the Holyoke District Court entered on May 5, 2004 denying the petitioners' motions for appointment of counsel;

2. Directing the respondents, the Justices of the Holyoke District Court, to conduct a further hearings for the petitioners and, if the court determines that the petitioner is indigent and has been held in custody for longer than two weeks following arraignment without the appointment of counsel to represent him, to authorize the payment of counsel at a rate higher than that which has been established by the legislature. The rate of payment which may be authorized pursuant to this paragraph shall be the rate which is necessary to secure representation by counsel for the defendant, but shall not in any event exceed the rates approved by the Committee for Public Counsel Services; and

3. Grant such further relief as the Court deems necessary.

By their attorneys,

David P. Hoose BBO #239400
Katz, Sasson, Hoose & Turnbull
1145 Main Street
Springfield, Massachusetts 01103
(413) 732-1939

John Reinstein BBO # 416120
ACLU of Massachusetts
99 Chauncy Street, Suite 310
Boston, Massachusetts 02111
(617) 482-3170

William C. Newman BBO #370760
ACLU of Massachusetts
39 Main Street
Northampton, Massachusetts 01060
(413) 584-7331

May 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing motion by mailing a copy thereof to counsel of record on this 20th day of May, 2004

John Reinstein

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SJ-2004-0198 & SJ-2004-0199

NATHANIEL LAVALLEE, *et al.*

V.

THE JUSTICES OF THE SPRINGFIELD DISTRICT COURT

and

MICHAEL CARABELLO, *et al.*

V.

THE JUSTICES OF THE HOLYOKE DISTRICT COURT

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR IMMEDIATE RELIEF AND OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

INTRODUCTION

Petitioners, as well as a steadily growing number of other indigent criminal defendants throughout Hampden County, have been arraigned, detained, and prosecuted in continuing violation of the right to counsel guaranteed to them by the Sixth and Fourteenth Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. In opposing their petitions for

relief in this Court, the Attorney General, on behalf of the respondent Justices of the Springfield and Holyoke District Courts, asserts that petitioners' requests for counsel is unreviewable because those requests purportedly have not been presented to and denied by the District Courts below (AG Mem. 3, 11).[1/] The Attorney General further asserts that this Court must deny relief in any event because any violation of petitioners' right to counsel is, in the opinion of the Attorney General, not actionable unless and until petitioners have been convicted after trial and sentenced to a period of incarceration without counsel (AG Mem. 7). The Attorney General's description of the proceedings below and of the indigent counsel crisis in Hampden County is inaccurate in material respects. The Attorney General's recommendation that this Court close its eyes to the continuing violation of petitioners' right to counsel is irreconcilable with forty years of constitutional case law following Gideon and with this Court's supervisory duty "to correct and prevent errors and abuses" occurring in the trial courts, G.L. c.211, §3, ¶1, and to "improve[] ... the administration of such courts, and ... secur[e] ... their proper and efficient administration." G.L. c.211, §3, ¶2.

[1/]The memorandum filed by the Attorney General in support of respondents' motion to dismiss is cited by page number as "(AG Mem.)." A transcript of the hearing before Judge Payne in Springfield District Court on May 5, 2004, is filed with this memorandum and is cited by page number as "(Tr.)."

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Carabello *et al.* (SJ-2004-0199).

The memorandum submitted by the Attorney General on behalf of the respondents omits any mention of the circumstances that gave rise to the claims asserted by the petitioners in Carabello. The five petitioners in that case are defendants whose cases are, or were, pending in Holyoke District Court. Counsel for indigent defendants in Holyoke District Court are exclusively provided through Hampden County Bar Advocates, Inc., which has contracted with the Private Counsel Division of CPCS to provide attorneys for indigent defendants in those Hampden County courts not covered by the Public Defender Division of CPCS. The Public Defender Division does not have sufficient to staff to permit it to cover the Holyoke District Court. It does not and has not assigned staff attorneys to that court. See Affidavit of Andrew Silverman, at ¶3.

As described in the affidavit of Christine Cosby, the administrator of Hampden County Bar Advocates, Inc., the program has experienced substantial difficulties in finding attorneys who are willing to accept appointments on Superior Court felonies which originate in the district courts outside of Springfield Affidavit of Christine Cosby at ¶3. The inability to find attorneys for indigent defendants has been a particular problem in Holyoke District Court, where delays

as long as three months have occurred. As discussed further, *infra*, the absence of attorneys who are willing and able to accept appointments in that court is the direct result of the low rates of compensation paid to appointed counsel.

The experiences of the named petitioners in Carabello starkly illustrate the effect of this situation on the rights of the accused. Joel Rodriguez and Luis Vallellanes are co-defendants. Each is charged with offenses within the final jurisdiction of the Superior Court. They were arraigned on February 19, 2004, and attorneys were appointed to represent them for purposes of arraignment only, but no attorney who is Superior Court certified was available to represent them in any further proceedings. Bail was set for Rodriguez at $5,000 cash or $30,000 surety and for Vallellanes at $10,000 cash or $35,000 surety. Neither Rodriguez nor Vallellanes was able to post bail, and both have been in custody, without counsel, since February 19, 2004.

Rodriguez and Vallellanes were brought into the Holyoke District Court on three separate occasions following arraignment for pre-trial hearings. On each occasion, however, no attorney was available to represent either of them, no action was taken in their cases, and they remained in custody. As they were unrepresented, no bail appeal was taken, there were no plea discussions, no witnesses were interviewed, and no resources were sought for purposes of investigation. In

short, nothing was done or could be done to address the issue of their continued confinement or the preparation of their defense.

Michael Carabello is in a similar situation. He is also charged with offenses within the final jurisdiction of the Superior Court. He was arraigned on April 2, 2004, at which time an attorney was appointed for purposes of arraignment only, but no bar advocate who is Superior Court certified was available to represent him in any further proceedings in the district court. Bail was set at $100,000 cash or $300,000 surety. Carabello has not posted bail and remains in custody. The docket shows that he was brought into court on May 5, 2004, but no bar advocate was present and willing to accept appointment to represent him.

Alberto Rivera is charged with offenses which are not within the jurisdiction of the District Court. He was arraigned on April 23, 2004, at which time an attorney was appointed for bail purposes only, but no bar advocate who is Superior Court certified was available to represent him in any further proceedings in the district court. Bail was set at $10,000 cash or $100,000 surety. Rivera has not posted bail and remains in custody.[2/]

[2/]Petitioner David Vaddy is now represented by counsel and is not seeking relief from the order of the District Court.

Lavallee *et al.* (SJ-2004-0198).

Court room one in Springfield District Court, where the right to counsel of petitioners in Lavallee attached, is one of the "busiest District Courts in the Commonwealth of Massachusetts" (Tr. 21). Judge Payne presided over court room one during the week that began on Monday, May 3, 2004. During the months prior to that date, it had become increasingly difficult for Hampden County Bar Advocates, Inc., to find lawyers who were willing to cover the arraignment sessions. Affidavit of Nancy T. Bennett, ¶¶8-11. No bar advocates at all appeared in court room one to accept assignments on Monday or Tuesday (Tr. 21). Attorney Carol Gray was working in courtroom one on May 3, 2004. Defendants who attempted to speak on their own behalf when brought before the court were advised by Judge Payne not to do so. Affidavit of Attorney Carol Gray, ¶7. Bail was set and bail status changed for unrepresented defendants. Id. at ¶4. Attorney Gray, a public defender assigned to cover courtroom one arraignments, was ordered by Judge Teahan to stop helping unrepresented defendants assert their right to counsel *pro se.* Id. at ¶16.

By May 4, 2004, Judge Payne had before him nineteen indigent defendants in custody and without counsel. The charges brought against these uncounselled defendants ran the gamut from relatively minor traffic-related offenses to serious

felonies not within the final jurisdiction of the District Court. See Affidavit of Andrew Silverman, Attachment 1 (NAC forms). After consultation with his colleagues, Judge Payne had the clerk's office fax "NAC" forms pertaining to each of these defendants to CPCS's Boston office, and notify CPCS that Judge Payne had assigned "William Joseph Leahy" to represent each defendant. Id.

Having received these notices on Tuesday afternoon, Chief Counsel Leahy drove to Springfield District Court and appeared in court room one at the call of the list on Wednesday morning. Chief Counsel Leahy emphasized to the Court that "[i]t has never been the aim of the Committee for Public Counsel Services to invoke litigation in order to enforce the right to counsel" (Tr. 6). He stated that he was not in attendance in order to provide individual representation to any of the nineteen defendants (Tr. 13). Instead, as to each defendant, Chief Counsel Leahy filed and argued collectively a Motion to Assign Certified Private Counsel.[3/] Each such motion was denied by the Court (Tr. 23-25), which ruled that it would "continue with the order appointing CPCS" (Tr. 25). Chief Counsel Leahy's objections were noted (Tr. 25).

[3/]Identical motions to assign counsel were filed on behalf of each of the unrepresented petitioners in Springfield District Court, and were denied by Judge Payne on May 5, 2004 (Tr. 5; Affidavit of Andrew Silverman at ¶9, and Attachment 2).

After the hearing on assignment of counsel had concluded, Chief Counsel Leahy suggested that he and the assistant district attorneys who were present might be able to "canvass these cases that have been sitting here for a day or two. Perhaps there are some that can be resolved, at least [as] to arraignment and bail issues" (Tr. 26). Several members of the bar agreed to represent individual in-custody defendants for purposes of setting bail. Numerous indigent defendants brought into Springfield District Court on May 3-5, 2004 (as well as before and after that date), remain unrepresented, some held and some released, as of the date of this filing.

ARGUMENT

A. THE PETITIONS ARE PROPERLY BEFORE THIS COURT PURSUANT TO G.L. c. 211, § 3.

The Attorney General asserts that the petitions must be dismissed because petitioners have purportedly "resorted directly to this Court" without having first sought and been denied relief in the District Court (AG Mem. 3). This assertion is wholly without merit. In the Springfield District Court cases, Judge Payne, after a hearing, denied petitioners' motions to assign counsel at a rate of compensation greater than that authorized by the Legislature on the grounds that, "under the ... provisions of [G.L. c.211D] and under the [rules of this Court, where] there are no ... competent attorneys willing or able to be appointed, then the appointment rests

[solely] on the shoulders of CPCS" (Tr. 23). In the Holyoke District Court cases, Judge Gordon, after a hearing, denied petitioners' motions for the appointment of counsel at a rate of $90 per hour, concluding in written findings that he had "no authority to order any increase in the level of compensation for appointed counsel."[4/] Judge Payne's ruling was made after "conversations ... with [his] superiors" (Tr. 5). Judge Gordon's ruling was based upon a memorandum of law issued by Chief Justice Zoll on May 5, 2004, in response to the current crisis informing District Court judges in Hampden County that they do not have any authority "to order any increase in the level of compensation for appointed cases."[5/] Contrary to the Attorney General's assertion in this Court, the record demonstrates that petitioners sought and were denied relief after the District Courts ruled as a matter of law that they were without discretion to order that assigned counsel be compensated at a rate greater than that set by the Legislature, even if, as here, persons who are constitutionally entitled to counsel would be left unrepresented as a result. The Attorney General's assertion that these petitions are

---

[4/] Copies of Judge Gordon's orders denying relief accompany the papers filed in Carabello, *et al.*

[5/] Judge Zoll's memorandum is attached to the orders issued by Judge Gordon in Carabello, *et al.*

not properly before this Court borders on the frivolous.[6/]

B. THIS COURT HAS THE POWER TO GRANT THE RELIEF SOUGHT BY PETITIONERS.

On the merits, the Attorney General shares Chief Justice Zoll's erroneous belief that a District Court judge may never order that assigned counsel be compensated at a rate greater than that authorized by the Legislature. In fact, and to the contrary, the "inherent authority" of the judiciary to bind the Commonwealth for such expenses as are "reasonably necessary for the operation of [the] court," recognized in O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 509 (1972), is reflected by S.J.C. Rule 1:05, which provides as follows:

> (1) Except as provided by paragraph (4), by statute, or by other rule or order of this court, no judge of a court shall enter into, order, or approve a contract on behalf of the Commonwealth or any of its political subdivisions requiring the expenditure of funds or the

---

[6/]The Attorney General observes that petitioners "did not request[] the justices of [the Springfield District Court] ... to consider invoking the provisions of S.J.C. Rule 1:05" (AG Mem. 3). In light of the District Courts' position, as set forth in Chief Justice Zoll's memorandum, that no statute or rule confers a district court judge with any discretion ever to order that assigned counsel be compensated at a rate greater than that set by the Legislature, it would be disingenuous to suggest that anything turns on the fact that petitioners' motions for extraordinary expenses did not cite to Rule 1:05, a rule directed primarily not to counsel but to trial courts considering such motions. In addition, the citation to S.J.C. Rule 3:10(5) in petitioners' District Court motions necessarily encompasses Rule 1:05, since the Rule 3:10(5) "exceptional circumstances"clause itself includes reference to "the rules of this court."

> incurring of a liability in excess of any appropriation therefor, or for which no appropriation has been made, without the written approval of the appropriate judicial officer designated by this court. The following officers are so designated: for the Appeals Court, its Chief Justice; for each department of the Trial Court, its Administrative Justice. Every judge seeking such approval shall file a written request for approval with the appropriate judicial officer and a copy with the Chief Administrative Justice of the Trial Court. Every request shall be in the form of a memorandum and shall set forth the following: (a) the nature and cost of the facilities, goods or services sought; (b) an explanation of the circumstances causing the judge to consider it reasonably necessary to the proper execution of the court's responsibilities; (c) a chronological account of administrative action previously taken to secure it; and (d) a statement of the action contemplated by the judge.
>
> * * *
>
> (4) The only exception to paragraph (1) shall be in instances where failure to obtain the required facilities, goods, or services expeditiously and without delay will frustrate the execution of the court's responsibilities. In every such instance, the judge entering into, ordering or approving a contract on behalf of the Commonwealth or any of its political subdivisions shall forthwith submit a memorandum of the type required by paragraph (1) to the appropriate judicial officer, with a copy to the Chief Administrative Justice.

S.J.C. Rule 1:05, as appearing in 382 Mass. 704 (1981) (emphasis supplied).

Chronic underfunding of the Commonwealth's indigent defense system has left CPCS unable effectively "to maintain a system for the appointment or assignment of counsel," as the Legislature has required it to do pursuant to G.L. c.211D, §5. Petitioners' constitutional right to counsel is being violated as a result. The absence of counsel not only harms petitioners but also prevents the

District Court from holding further proceedings in petitioners' cases, precludes a fair and expeditious resolution of those cases, interferes with the efficient administration of justice, and "frustrate[s] the execution of the court's responsibilities." S.J.C. Rule 1:05(4). Under these circumstances, the O'Coin's doctrine, insofar as it has been codified by Rule 1:05(4), confers respondents with the authority, upon an adequate showing in a particular case, to order that assigned counsel be compensated at a rate that is higher than that set by the Legislature.[7/]

Chief Justice Zoll is similarly incorrect in his assertion that S.J.C. Rule 3:10, §5, does not confer the trial court with any discretion ever to order that assigned counsel be compensated at an increased rate, even if it is shown that such an expenditure is essential in order to ensure that the courts may function and constitutionally-required counsel is provided to an indigent defendant in a particular case. Rule 3:10, §5, states in pertinent part that, if a party entitled to counsel has been found to be indigent,

> the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate use of a different procedure that is consistent with G. L. c.211D and the rules of this court.

[7/]The Attorney General does not dispute that the rates of compensation paid to bar advocates are inadequate. Nor does the Attorney General suggest that there is any reason other than the inadequate rates for the lack of qualified counsel able to accept appointment in the instant cases.

The inability of CPCS to provide petitioners in these cases with the legal representation to which they are constitutionally entitled is an "exceptional circumstance[]" warranting the District Court's "use of a different procedure," namely, one that does not ineffectually seek to secure counsel by providing woefully inadequate compensation to counsel otherwise willing, ready, and able to accept assignment. Such a procedure is not merely "consistent" with G.L. c.211D, but lies at the heart of the statutory scheme, the very purpose of which is to ensure the provision of constitutionally required counsel. Such a procedure is similarly in full accord with this Court's inherent authority and statutory duty under G.L. c.211, §3, to order such steps as are minimally necessary to ensure that the substantive right announced in Gideon is not rendered meaningless.

Machado v. Leahy, 17 Mass. L. Rep. 263, 2004 Mass. Super. LEXIS *14, on which the Attorney General relies heavily, involved solely a claim by bar advocate attorneys that they had an enforceable right against CPCS to be paid more than what the Legislature had authorized CPCS to pay them. By contrast with the instant cases, the plaintiffs in Machado did not include any person whose right to counsel was alleged to have been violated, and among the defendants there was no entity which possessed the authority to override statutory limitations on compensation rates. The holding of Machado is thus irrelevant to the cases at hand.

The dicta of Machado, however, is directly on point. Having accepted the Attorney General's argument that the bar advocate plaintiffs had no case against CPCS, the Court went on in Machado to opine that the Legislature "could rationally choose to set the lowest possible compensation rates, even if that means losing experienced attorneys and overburdening those remaining." Id. at *39. Any bar advocate dissatisfied with her rate of compensation, the Machado Court suggests, should just stop representing indigent persons, and any indigent person whose right to counsel was violated as a result should petition the Supreme Judicial Court for relief pursuant to G.L. c.211, §3. Id. at *24, *26-27.

The Attorney General suggests that petitioners' right to counsel might be vindicated if CPCS would simply "redeploy[] some bar advocates and public defenders from other parts of the Commonwealth" to Hampden County (AG Mem. 15-16). At best, the Attorney General's suggestion is fanciful and wholly unrealistic. CPCS, including but not limited to the Hampden County Bar Advocates program and the Springfield office of the Public Defender Division, has made every conceivable effort to prevent, forestall, and otherwise constructively address the assigned counsel crisis which currently exists. Unlike a branch of government, however, CPCS has no power -- inherent, statutory, or contractual -- to compel an unwilling bar advocate attorney to accept assignment in any particular case. Nor is it possible for CPCS to transfer staff attorneys from other

Public Defender Division offices to Springfield without violating existing attorney-client obligations and, at the same time, creating equally serious right to counsel crises elsewhere throughout the State.[8/] See Further Affidavit of Andrew Silverman.

Contrary to the Attorney General's claim (AG Mem. 8), petitioners are not "seek[ing] to have this Court override the Legislature's annual budget enactments and the statutory limitation on CPCS's power to set rates of compensation as 'subject to appropriation.'" Rather, petitioners simply ask that this Court ensure that their fundamental right to counsel is not abridged. There is an existing appropriation from which any lawful court order for assigned counsel compensation may be drawn. Should that appropriation be depleted before the fiscal year ends – as has occurred in virtually every fiscal year since the Legislature enacted G.L. c.211D in 1984 – that is a funding gap that has historically been bridged by the Legislature through the enactment of a deficiency budget.

The Attorney General correctly observes that the current crisis in Hampden County is but a part of "a statewide problem calling for a statewide solution" (AG Mem. 16). But, contrary to the approach urged by the Attorney General, the fact

---

[8/]The Attorney General does not suggest that CPCS has the statutory authority to assign cases to uncertified attorneys, or otherwise compel unwilling attorneys to accept case assignments. CPCS has no such power. See G.L. c.211D, §1 *et seq.*

that the crisis happens to have come to a head in Hampden County is hardly a reason for this Court not to exercise its supervisory authority to ensure that the trial courts in that county are able to function. Nor would a decision by this Court to take appropriate steps to address the immediate harm being suffered by the unrepresented petitioners now before the Court in any way usurp the Legislature's prerogative to fashion a statewide solution. The Attorney General's suggestion, that it would be "premature[]" (AG Mem. 17) for this Court to act to remedy a violation of the right to counsel in cases in which such a violation has been established, is a prescription for disaster. The record demonstrates that the present emergency follows year after year of unsuccessful efforts by CPCS and others, including the judiciary, to persuade the Legislature to increase the Commonwealth's assigned counsel rates – rates that have actually *regressed* since 1984, and are now among the lowest in the Nation. See The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview (August 2003).[9/] Should this Court order higher interim emergency rates in order to provide counsel to petitioners, the

---

[9/] A copy of the Spangenberg Group's report and its accompanying state-by-state table of rates of compensation is submitted with this memorandum. The data in this report was considered by and influenced the decision of CPCS's board which voted unanimously in 2002 to raise assigned counsel rates to $60 per hour for District Court cases, $90 per hour for Superior Court cases, and $120 per hour for murder cases.

Legislature would remain free to announce its own revised rates, which could be lower than what this Court orders, so long as they are sufficient to effectively secure the constitutional right to counsel.

D. Petitioners' right to counsel encompasses a right of continual representation from arraignment through sentencing.

Notwithstanding the fact that petitioners are without counsel, the Attorney General points to the fact that petitioners – or some of them – may have had "bail only" counsel at their arraignments,[10/] as though that fact alone had some talismanic power to eradicate the harm from the denial of counsel which petitioners continue to suffer. For the Attorney General, this moment in time during which petitioners briefly had counsel, and the fact that none of the unrepresented petitioners has yet had his or her case proceed to trial, yields the conclusion that there has been no denial of constitutionally-mandated assistance of counsel. According to the Attorney General, Gideon's trumpet sounds "only ... if the defendant is subject to incarceration upon conviction," and since that has not yet happened in any case before the Court, there has been no violation of any substantial right (AG Mem. 7).

[10/] Petitioners do not concede that counsel was in fact provided at "arraignment."

Contrary to the Attorney General's position, once the right to counsel attaches, it carries with it the right to on-going pretrial assistance of counsel and to representation by counsel in multiple critically important respects. There is a wide range of required activities that must be undertaken by competent counsel assigned to represent an indigent defendant who faces serious criminal charges. Counsel must promptly launch an intensive factual investigation, which necessarily includes locating and interviewing prosecution and defense witnesses. Counsel must also locate and preserve potentially important physical and documentary evidence (e.g., tape recordings of "911" calls, police "turret tapes," medical and counseling records, hospital "rape kit" contents) so that this evidence will be available for later defense inspection and testing. Counsel must serve as the defendant's representative and intermediary in responding to police or prosecution requests to question the defendant, as well as represent the defendant who may be interested in exploring the possibility of defense cooperation in exchange for favorable treatment. Counsel must be present to protect the defendant's rights at identification procedures. Counsel must assess the defendant's mental status, and make a determination whether to pursue competency, criminal responsibility, or other psychiatric evaluations of the defendant. Counsel must also commence efforts, where appropriate, to enroll the defendant in treatment, educational, and other programs which might later be utilized in advocating for a

more lenient sentence. Counsel must conduct a range of legal research, including determining whether there are grounds for moving to suppress evidence or to dismiss the case. Counsel must file pretrial motions, participate in a pretrial conference with the prosecutor, conduct evidentiary motions hearings and, in appropriate instances, pursue interlocutory appellate relief. In short, there are myriad tasks and responsibilities that competent counsel must undertake after he or she is first assigned to represent a defendant, and which, if the defendant is to receive the effective of assistance of counsel, must be completed long before a trial on the merits ever commences. See Committee for Public Counsel Services Performance Guidelines Governing Representation of Indigents in Criminal Cases, at 4-1 to 4-28 in CPCS ASSIGNED COUNSEL MANUAL (1999).

The memorandum of law filed by the Attorney General envisions a formalistic "right to counsel" which confers to petitioners the right only to have a member of the bar present for the trial of the case. Neither the decisions of the United States Supreme Court, nor the jurisprudence of this Court, lends any support to this crabbed view of the right to counsel.

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal

cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963).

The plain wording of the Sixth Amendment is not restricted to trial but rather "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" United States v. Wade, 388 U.S. 218, 225 (1967) (quoting Sixth Amendment). The "fundamental" right to counsel recognized in Gideon thus extends to "all critical stages of the proceedings," Iowa v. Tovar, 124 S.Ct.

1379, 1383 (2004), from arraignment, Kirby v. Illinois, 406 U.S. 682, 689 (1972), through sentencing. Mempha v. Rhay, 389 U.S. 128 (1967).

Gideon is not satisfied simply by assuring that a lawyer is standing next to the defendant at a trial, or even at every critical stage of the in-court proceedings. Rather, the right to counsel necessarily includes the right to continual representation by competent counsel, who conducts an "adequate investigation" of the case prior to trial, Commonwealth v. Staines, 441 Mass. 521, 530 (2004), citing Commonwealth v. Roberio, 428 Mass. 278, 279-280 (1998), who litigates all viable pretrial suppression motions, Commonwealth v. Comita, 441 Mass. 86, 90 (2004), who has a "satisfactory discussion with [the accused] about the options realistically available to him," Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984), and who otherwise acts to protect the defendant's rights prior to trial. "[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, supra, 388 U.S. at 224. "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the

accused's right to a fair trial." Id. at 226.

Thus, the fundamental right announced in Gideon "cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." Maine v. Moulton, 474 U.S. 159, 170 (1985).

This Court has "repeatedly held that the right to be assisted effectively by counsel is independently guaranteed by art. 12." Commonwealth v. Rainwater, 425 Mass. 540, 553 (1997) (internal citation omitted).

> Article 12 provides that "every subject shall have a right to . . . be fully heard in his defence by himself, or his counsel, at his election." We have long interpreted that text generously to recognize the "fundamental . . . right of a person accused of a serious crime to have the aid and advice of counsel." Guerin v. Commonwealth, 339 Mass. 731, 734 (1959). And we have drawn on our own judgment and experience to grant more expansive protections under art. 12 than have been required of States under the Sixth Amendment.
>
> * * *
>
> [T]his court and the bar of the Commonwealth have historically taken measures to assure persons charged with crime the benefits of legal representation. Thus the Supreme Judicial Court adopted a rule which required

> the appointment of counsel in all noncapital felony cases in 1958, five years before Gideon v. Wainwright, 372 U.S. 335(1963), imposed this obligation on the States. See Rule 10 of the General Rules, 337 Mass. 813 (1958) (now S.J.C. Rule 3:10, as appearing in 416 Mass. 1306 [1993]). In 1964, this right was expanded to encompass indigent defendants who were charged with any crime which might result in imprisonment, Rule 10 of the General Rules, as appearing in 347 Mass. 809 (1964), several years before the Supreme Court declared the same right under the Federal Constitution. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). See Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U.L. Rev. 887, 888-889 n.7 (1980). And as notable as have been this court's efforts in this area, the efforts of the bar in responding to this mandate for many years on a largely pro bono basis have been even more so.

Id. at 553-554.

This Court's art. 12 jurisprudence recognizes that "inexperienced, unrepresented criminal defendants [cannot be expected] to understand court procedures or to know how to go about pressing their case through the criminal justice system." Commonwealth v. Lasher, 428 Mass. 202, 204 (1998) (internal quotation omitted). See also Guerin v. Commonwealth, 339 Mass. 731, 734 (1959) (the right to counsel "is a right upon which the essential element of

fairness in the administration of justice depends"); Cardran v. Commonwealth, 356 Mass. 351, 354 (1969) (where defendant had counsel appointed pursuant to S.J.C. Rule 3:10, reversible error to permit him to withdraw his appeal to the jury session without counsel being present); Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (recognizing importance of continuity of representation by a single informed lawyer; substitution of one public defender for another does not suffice where the second lawyer knows nothing about the defendant's case); G.L. c.211D, §9(a) (stating that required CPCS standards "shall include ... vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible").

E. The Court should grant the preliminary relief sought by the individual petitioners in their motions.

A request for preliminary relief in an action brought pursuant to G.L. c.211, § 3, necessarily involves consideration of factors which parallel the standards for granting a preliminary injunction under Mass. R. Civ. Pro. 65. In order to secure a preliminary injunction, the moving party must show that "failure to issue the injunction would subject the moving party to a substantial risk of irreparable

harm." Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). The court must then evaluate (1) the plaintiff's claim that he will suffer irreparable harm if the injunction is denied; (2) the injury the defendant will suffer if the injunction is granted; (3) the likelihood of success on the merits; and (4) the nature of the public interest. Town of Brookline v. Goldstein, 388 Mass. 443, 447 (1983).

As discussed in the preceding sections of this memorandum, the injury to those petitioners who are seeking preliminary relief, each of whom continues to be held in lieu of bail, is both immediate and irreparable, and each has a strong likelihood of success on the merits. The petitioners who seek preliminary relief have been deprived of their liberty for a substantial period, some for as long as three months. Without counsel, they are without the ability, as a practical matter, to challenge the amount of their bail. Moreover, without the assistance of counsel, no steps have been taken during this period to prepare a defense, which, given the amount of time that has elapsed, may well have deprived them "of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). No witnesses have been interviewed. No steps have been taken to secure evidence which may become unavailable. No experts have been consulted

or retained. No motions have been filed to obtain funds for investigation or other resources needed for the defense.

Beyond this, it should also be noted that the petitioners seeking immediate relief have been deprived of various opportunities to obtain a more favorable disposition of the charges against them that would be available if they were represented. For example, there have been no opportunities for discussions of a plea or a reduction of charges that would allow the cases to be resolved in the District Court.

To be sure, claims of ineffective assistance of counsel are ordinarily resolved on a case by case basis and only after conviction. The petitioners in these cases, however, are not asserting a claim of ineffective assistance of counsel. They are claiming that they are entitled to have counsel in the first instance, and that they should not be detained for extended periods without the appointment of counsel. "This standard [of ineffective assistance] is inappropriate for a civil suit seeking prospective relief. The Sixth Amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the Sixth Amendment.

In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief -- whether the defendant is entitled to have his or her conviction overturned -- rather than to the question of whether such a right exists and can be protected prospectively." Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), reh. denied, 896 F.2d 479 (1988), cert. denied, 495 U.S. 957 (1990).

Preliminary relief is required in order to prevent the impairment of the core right to a fair trial. As one court has noted in this context, "[t]he purpose [of the assistance of counsel] is to ensure that the defendant has the assistance necessary to justify society's reliance on the outcome of the proceedings." New York County Lawyers' Ass'n v. State of New York, 745 N.Y.S. 2d 376, 192 Misc.2d 424 (2002). The entry of prospective injunctive relief is fully justified where it is necessary to prevent the occurrence of a threatened violation of a constitutional rights. Id., 745 N.Y.S. at 385. Nicholson v. Williams, 203 F.Supp.2d 153, 240 (E.D.N.Y. 2002).

Consideration of the public interest strongly militates in favor of the petitioners. The Commonwealth, and the courts, have a constitutional obligation

to provide indigent defendants with counsel. To be sure, as the Attorney General has argued, the inadequacy of the funds available to pay appointed counsel is the result of legislative action. The immediate relief sought by the petitioners, however, does not require this Court to engage in a constitutional stand off with the General Court concerning the appropriation of funds for the payment of appointed counsel. Indeed, such a result is to be avoided if at all possible. Rather, what the petitioners request is that the court determine that the justices of the district courts have the authority under the O'Coin's doctrine and under the emergency provisions of S.J.C. Rule 1:05 and S.J.C. Rule 3:10§5, to authorize CPCS to compensate counsel at some rate higher than that which has been established by the Legislature where (a) the payment at a higher rate is determined by the court to be necessary to provide counsel for an individual defendant who is currently in custody and (b) further delay in the appointment of counsel would deprive the defendant of the constitutional right to counsel.

Ultimately, a resolution of the current crisis will require action by the Legislature. That fact does not detract however from the showing that has been

made by the petitioners, nor does it relieve the court of its responsibility to insure the protection of the constitutional rights of the accused.

COMMITTEE FOR PUBLIC COUNSEL SERVICES

By its Chief Counsel,

William J. Leahy
BBO #290140
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212

John Reinstein
BBO #416120
American Civil Liberties Union of Massachusetts
99 Chauncy Street
Suite 310
Boston, Massachusetts 02111
(617) 482-3170

David P. Hoose
BBO #239400
KATZ, SASSON, HOOSE, AND TURNBULL
1145 Main Street
Springfield, Massachusetts 01103
(413) 732-1939

Dated: May 20, 2004.

AFFIDAVIT OF WILLIAM J. LEAHY

I, William J. Leahy, hereby state that:

1. I am the Chief Counsel of the Committee for Public Counsel Services (CPCS). I was employed as a staff public defender with the Massachusetts Defenders Committee from 1974 to 1984. From July, 1984 through June, 1991 I served as Deputy Chief Counsel for the CPCS Public Counsel (Defender) Division. I have served in my current capacity since July 1, 1991.

2. My responsibilities as Chief Counsel include "the overall supervision of the workings of the various divisions of the committee." G.L. ch. 211D, section 13. This includes oversight of the performance of approximately 240 employees, 2,500 assigned private counsel, and the provision of competent representation in the close to 250,000 cases annually.

3. The Committee for Public Counsel Services is the statewide public defender and assigned counsel agency that oversees the appointment of counsel on civil and criminal cases in which there is a right to court appointed counsel under the state and federal constitution, by statute, by case law or by rule of court. The enabling statute creating the Committee for Public Counsel Services is G.L. Chapter 211D.

4. In accordance with the provisions of section 1 of Chapter 211D, the governing body of the Committee for Public Counsel Services (hereinafter the Committee) is comprised of fifteen persons who are appointed by the Justices of the Supreme Judicial Court.

5. Section 11 of Chapter 211D vests in the Committee the authority to "establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent" indigent persons under Ch. 211D.

6. In 1994, the Committee authorized its Budget Subcommittee to review the hourly rates of compensation then payable to private assigned counsel. Those rates were (expressed as an in-court hourly rate followed by an out-of-court hourly rate): District Court, Delinquency and CHINS - $25/$35; Superior Court - $25/$25 – Murder $50/$50; Care and Protection - $35/$35; and Mental Health - $35/$35.

7. Upon the recommendation of the Budget Subcommittee, in May of 1994 the Committee voted to eliminate the discrepancy between in-court and out-of-court rates and to increase the hourly rates of compensation payable to private counsel to: District, Delinquency and CHINS - $50; Superior Court - $65; Murder $85; Care and Protection - $65; and Mental Health - $65.

8. In 2002, the Committee convened a subcommittee to review the hourly rates of compensation then payable under the annual CPCS appropriation to private

assigned counsel. Those rates were: District Court, Delinquency and CHINS - $30; Superior Court - $39; Murder - $54; Care and Protection - $39 and Mental Health - $39. Those rates took effect in 1996 and 1997 (Superior Court increased from $30/hour to $39/Hour in 1997) and are the rates of compensation in effect as of this date.

9. The information relied upon by the subcommittee in its review of the hourly rates included a July, 2002 national survey of hourly rates paid to private counsel. That survey, attached as Exhibit 1, is entitled "Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial". The survey includes the rates of compensation paid to private assigned counsel in each of the 50 states, in the District of Columbia and by the United States government.

10. Upon completion of its review in December 2002, the subcommittee recommended and the full Committee approved an increase in the private counsel hourly rates to: District Court, Delinquency and CHINS - $60; Superior Court - $90; Care and Protection - $90; Mental Health - $90; and Murder - $120.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 20TH DAY OF MAY, 2004

William J. Leahy

William J. Leahy, Chief Counsel
BBO #290140
Committee for Public Counsel Services
44 Bromfield Street - Suite 200
Boston, MA 02108
(617) 482-6212

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SINGLE JUSTICE
SJ-2004-0198

NATHANIEL LAVALLEE, *et al.*

V.

THE JUSTICES OF THE SPRINGFIELD DISTRICT COURT

FURTHER AFFIDAVIT OF ANDREW SILVERMAN

I, Andrew Silverman, do hereby state on information and belief the following:

1. I am the Deputy Chief Counsel for the Public Defender Division of the Committee for Public Counsel Services (CPCS). I have been employed as an attorney with CPCS since 1980, and I have served as Deputy Chief Counsel for the Public Defender Division since July, 1997.

2. My responsibilities as Deputy Chief Counsel include oversight and management of the 13 Public Defender Division offices located throughout the Commonwealth. There are Public Defender Division offices located in Barnstable, Boston, Brockton, Cambridge, Dedham, Lowell, New Bedford, Northampton, Pittsfield, Roxbury, Salem, Springfield, and Worcester.

3. Substantial budget cutbacks over the last three fiscal years in the funding for the Public Defender Division have resulted in significant reductions during that time period in the number of staff attorneys employed by the Public Defender Division. Three years ago there were approximately 130 attorneys employed statewide by

the Public Defender Division. Today, there are only 109 Public Defender Division staff attorneys. Of the 109 attorneys in the Public Defender Division, seven attorneys are now on extended leaves of absence.

4. The cases handled by Public Defender Division attorneys are primarily serious felony cases, within the jurisdiction of the Superior Court. In my role as Deputy Chief Counsel, I work with the attorneys-in-charge of each of the 13 Public Defender Division offices to monitor attorney caseloads within those offices and ensure that caseloads are appropriately adjusted so as to account for attorney experience levels and supervisory responsibilities. As the Public Defender Division has lost staff attorney positions, and the number of private bar advocate attorneys accepting Superior Court assignments has simultaneously declined, the caseloads of the remaining staff attorneys in all offices have increased significantly. In each of the 13 Public Defender Division offices, staff trial attorneys have full caseloads. The attorneys in the 12 Public Defender Divsion offices located outside Hampden County are not able to take on additional cases in Hampden County.

5. The reduced resources of the Public Defender Division offices have made it possible to lend only limited assistance as the counsel crisis has deepened in Hampden County. On or about March 25, 2004, staff attorneys from the Public Defender Division offices in Berkshire, Hampshire, and Worcester counties took on representation of clients in three pending Hampden County cases in order to provide emergency assistance for three indigent defendants who had been held for

lengthy periods of time without counsel on serious cases (i.e., rape and arson) which were then pending in the Westfield, Holyoke and Palmer District Courts. The defendants in those cases had each been held for weeks without counsel. The Hampden County Public Defender Division Office in Springfield does not have sufficient attorney staffing to take cases from district courts other than Springfield District Court, and no private bar advocate attorney could be found who would accept an appointment in any of the three cases.

6. Full caseloads prevent assignment of additional Hampden County cases to attorneys in the Berkshire, Hampshire, or Worcester offices; nor is it possible to assign Hampden County cases to attorneys in the remaining Public Defender Division offices. Assignment of Hampden County cases to staff attorneys in the offices outside Hampden County would push those non-Hamden County staff attorneys beyond the point where they could provide effective assistance of counsel to their existing clients.

7. It is not possible to reassign staff attorneys from adjacent counties, or from more distantly removed counties, to Hampden County. There are not sufficient numbers of bar advocate attorneys to take over the existing serious cases which are being handled by the staff attorneys who would transfer to Hampden County. Removing staff attorneys from Public Defender Division offices in counties adjacent to Hampden County would immediately create a counsel crisis in those adjacent counties.

8. There are only a handful of private bar attorneys who take Superior Court

assignments in Berkshire, Franklin and Hampshire counties. In the current fiscal year, only 28 Superior Court certified private attorneys have accepted assignments in Superior Court cases; and of that number, only three attorneys have taken ten or more cases each.

9. At the present time, the Public Defender Division offices in Berkshire, Hampshire (and Franklin), and Worcester counties are just barely able to handle the existing Superior Court jurisdiction case assignments generated by the courts in those counties. The private bar in each of those counties is increasingly unwilling to accept new appointments.

10. On May 18, 2004, I received notice from Alan Rubin, the attorney-in-charge of the Public Defender Division office in Hampshire County, that there are many days on which there are no bar advocate attorneys at all who are available to accept appointments in the Hadley District Court. Attorney Rubin has learned that a justice of the Hadley District Court has now indicated that it is the Justice's intention to insist that Mr. Rubin's staff attorneys take additional cases. Attorney Rubin believes that his office does not have the capacity to accept additional case assignments.

11. Involuntary transfer of staff attorneys to Hampden County is not feasible. In the last three years alone, more than 50 staff attorneys have resigned from the Public Defender Division. Based on interviews with those departing attorneys, it is absolutely clear that the vast majority of staff attorney resignations were prompted by the inadequacy of the salaries paid to Public Defender Division staff attorneys.

See, for example, the attached article from the *Boston Sunday Herald*, "State pays third-rate wages to first-rate public attorneys" (April 11, 2004). Most of the Public Defender Division staff attorneys presently employed by CPCS are barely able to subsist on the salaries they are paid.

12. Over the last several years, as Public Defender Division staff attorneys have left employment in the Springfield office, there have been multiple internal attorney job postings inviting staff attorneys from other offices to transfer to the Springfield Public Defender Division office. Not a single person has expressed an interest in transferring to the Springfield office. I am convinced that the inevitable dislocation of forced transfers, combined with the increased fiscal and human toll of commuting to Hampden County, would be the final straw for attorneys transferred and would result in their resignation from CPCS.

13. Carol Gray, an attorney in the Springfield office of the CPCS Public Defender Division, was present in Springfield District Court on Monday, May 3, 2004, and again on Tuesday, May 4, 2004. According to Attorney Gray, based on her personal observations as well as her conversations with court officials, the indigent defendants who were brought to court that day for arraignment, including the named petitioners in this matter, were in fact arraigned by the Court (Payne, J.). The Court entered a plea of not guilty for each defendant, and proceeded to set bail or make orders relative to pretrial detention for each of the defendants. None of the petitioners was represented by counsel during his or her arraignment on May 3 and 4, 2004.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS THE 20th DAY OF MAY, 2004.

Andrew Silverman
BBO #462700
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street, Room 200
Boston, Massachusetts 02108
(617) 482-6212

Boston Sunday Herald

LETTERS

PATRICK J. PURCELL, Publisher
KEN CHANDLER, Editorial Director

ANDREW P. GULLY
Managing Editor

RACHELLE COHEN
Editorial Page Editor

ERIC NORMENT
Sunday Editor

VIRGINIA BUCKINGHAM
Deputy Editorial Page Editor

State pays third-rate wages to first-rate public attorneys

Just last month, Massachusetts lost yet another outstanding lawyer from the ranks of those who serve the public interest at great financial sacrifice. Eve Hanan was a first-rate public defender with the Committee for Public Counsel Services.

Five years ago, we had been fortunate to hire this University of Michigan Law School graduate,

AS YOU WERE SAYING . . .
William J. Leahy

whose credentials were so impressive that she could have chosen virtually any legal aid, public defender or prosecutor job in the nation. But after five years of excellent representation of her clients in cases involving the highest possible stakes in our criminal justice system, Hanan simply could not afford to continue on the $39,000 annual salary we were able to pay. Hanan did not want to leave public-interest work, and she did not have to, because the Public Defender Service in Washington, D.C., was able to pay her $74,000.

Many people know that lawyers who choose to work for a public employer pay a steep price. For example, a new lawyer who works in almost any other Massachusetts government agency receives a starting salary of no less than $43,347, or about one-third of the six-figure salaries offered by successful private law firms.

Few citizens are aware, however, that a small group of state-employed attorneys have it even worse. These lawyers are paid not the second-tier salaries offered to the typical Massachusetts state attorney, but an insulting third-rate salary of $35,000. Moreover, this appalling starting salary is accompanied by a totally inadequate salary "scale," which provides no assurance of regular or sufficient salary increases based on experience and performance.

The lowest-paid Massachusetts government attorneys are an elite group whose members competed fiercely to be hired for positions of great responsibility, positions that require the highest academic and personal credentials. Unlike most attorneys — private or public — these lawyers are active litigators who appear in our courtrooms virtually every day.

They are embroiled daily in complex and weighty issues of personal liberty, public safety and the enforcement of the most fundamental rights and responsibilities of all citizens under the Massachusetts and U.S. constitutions. These men and women have mastered the legal and advocacy skills required to engage successfully in trial litigation before juries and appellate litigation before our highest courts.

They are the staff attorneys of the Committee for Public Counsel Services, the assistant district attorneys employed by the elected district attorney in each Massachusetts county and the assistant attorneys general employed by the attorney general of the commonwealth. These are full-time professionals who routinely work 50 to 60 or more hours per week, who receive no overtime compensation and who are prohibited by statute from engaging in the private practice of law.

Their paltry salaries are a disgrace to the quality of justice in Massachusetts, and the commonwealth is ill-served by not being able to retain the services of these dedicated public servants. Yet it does not have to be this way. For less than $1.5 million, all CPCS staff attorneys could be raised from their current financial abyss to the salary levels of other state counsel. For another $7.5 million, all assistant district attorneys and assistant attorneys general could receive identical financial justice.

Gov. Mitt Romney's budget recognizes the inadequacy of CPCS staff attorney salaries but does not provide a realistic source of funding to correct them. The budgets now under consideration by the House and Senate should include funding to end the third-rate pay status of the state's public defenders and prosecutors.

If we could have paid Hanan the $50,000 salary other state lawyers with five years' experience receive, it is very likely we would not have lost her to another public defender agency. Favorable action by the Legislature is needed to preserve the quality of justice in Massachusetts.

William J. Leahy is chief counsel in the Committee for Public Counsel Services. As You Were Saying is a regular feature of the Boston Herald. We invite our readers to contribute pieces of no more than 600 words. Mail contributions to the Boston Herald, P.O. Box 55843, Boston, MA 02205-5843, fax them to 617-542-1315 or e-mail to oped-@bostonherald.com. All submissions are subject to editing and become the property of the Boston Herald.

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss Department of the Trial Court

Springfield Court Division

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff

VS.

NATHANIEL LAVALLEE, ET AL,

Defendants

HEARING HELD ON MAY 5, 2004 AT THE SPRINGFIELD DISTRICT COURT BEFORE JUDGE JOHN M. PAYNE

APPEARANCES

William Leahy, Esq. Attorney for the

Chief, Counsel, CPCS Defendants

Reporter: Raymond F. Catuogno

Registered Professional Reporter

(Transcript Prepared from Tape)

[TAPE 1, SIDE A]

[TAPE 1 WAS CORRUPTED AND INAUDIBLE]

[TAPE 2, SIDE A]

MR. LEAHY: That's as much of the history as I want to get into now, but there is no contractual relationship between CPCS and the individual lawyers who have come and said to you in one way or another directly or indirectly, that they're not available any longer at $30.00 an hour.

What we have said, what I have said on some occasions, what the agency has said, that we have not sought in any case, until today at least; we have not sought in any case, we have not asked any judge to approve an amount in excess of the statutorily authorized amounts. Those when I say "statutory", the way that is conveyed by the legislative authority is throughout any budget appropriation. You don't actually see the numbers in the budget line, but it

refers back to the same rates as the previous year. And if you drop that far enough, about five or six years, we'll find that $30.00 District Court rate in the budget language. Since then, it's been incorporated from year to year.

What we have said is that if a judge finds either in the exercise of his discretion under the extraordinary circumstances clause of SJC Rule 310, Section 5; or, in the exercise of his inherent authority to provide for both an efficient judicial operation and the enforcement of legal and constitutional rights, that we would honor such an order. And, you know, I suppose that may you may have to honor an order anyway, but we would willingly comply with such an order.

To date, there have been four judges in three courts, the District Court, the Juvenile Court, and the Superior Court, who have issued such orders. In at least one case, a bill

has come in with the attachment of the judicial order, which goes into some detail as to why exceptional circumstances existed in that case, and we processed that bill for payment. We have not suggested to anyone, that go out there and tell the court you'll get $60.00 and we'll stand behind you, it's not that sort of an arrangement at all. I don't know what you heard and I know sometimes things can get magnified over. It's ironic, in a sense, because I was just reading an e-mail yesterday that emanated from I think one of the same sources you may be referring to. And it was an e-mail that went out all over the state that said CPCS is doing exactly nothing for us.

So it depends on the moment and the mood and I think in terms of what it is. But I'm trying to give you what our, what our position is.

And our position today, Your Honor, after consultation with the

chairman, my boss, the chairman of my governing board, Willy Davis, is that I appear on behalf of the Committee for Public Counsel Services with most of in each of the 19 cases which I received notice of assignment of counsel yesterday, in each case, what I've done, Your Honor, and I'll hand them to the clerk in a moment, is I've it's a motion to assign certified private counsel. I've handwritten the defendant's name and the case numbers. And each one bears my signature, of course. And what it, I'll hand these to the clerk now.

And it seeks certain relief that, you know, in view of the conversations you referred to with superiors in your own, in your own branch of responsibility, you know, it may or may not be something you're able to consider. But it does not seek explicitly higher rates, it seeks the exercise of this court's discretion to

assign counsel if it can and I'd like to speak to that point separately a little bit, if I could --

THE COURT: Certainly.

MR. LEAHY: -- from legal grounds. Because I think, I think this is a I want to explain to the court that this situation is a situation in which threats of litigation and in Bristol County, of course, there already has been litigation, now terminated. But there have been threats and promises and word about litigation, you know, from a major Boston law firm and from other sources. It has never been the aim of the Committee for Public Counsel Services to invoke litigation in order to enforce the right for counsel.

Our effort has been entirely to do everything, everything we can do to discharge our obligation because as the court has said, it is our obligation to provide counsel. And we have fought for higher rates, we have fought for higher

salaries for the public staff; we've had tremendous support from judicial leaders in those efforts, all the chiefs of the various trial court departments, right up to the SJC, have been out there publicly supporting these efforts, to no avail to date, or to little avail.

I'll try to describe in a minute, what I see as some of the potential cracks in the armor right now as we speak. But we're at a moment today when the words I always think of when I harken back to the Giddeon decision is the right to counsel. Let me just make sure I've got it. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." That's a tremendously forceful, almost emotional statement by Justice Black speaking for a unanimous Supreme Court in the Giddeon case itself.

And as 40 years of experience has shown, the implementation, and as I well

know from an almost thirty year career of trying to enforce the Giddeon right, is that the implementation is expensive, is cumbersome, it's difficult and it is not popular in the elected branches of government. And I don't mean not popular in the sense that people bear ill will, I mean not popular relative to other pressing society needs.

We submit that this court, every court, has the authority in its inherent judicial capacity under the case of O'Coynes and I just wanted to, if I could, just take one moment to read a single passage from that significant case. Sorry, I misplaced my --

THE COURT: It's all right.

MR. LEAHY: Here it is. It's axiomatic I'm quoting now from the SJC in O'Coynes, 362 Massachusetts, 507. "It's axiomatic, that as an independent party of government, judiciary must have adequate and sufficient resources to ensure the proper operation of the

course. It would be illogical to interpret the Constitution as creating a judicial depart with awesome powers over the life and property of every citizen, while at the same time, denying to the judges, authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel. Such authority must be vested in the judiciary if the courts are to provide justice and the people are to be secure in their rights under the Constitution."

Now I will quickly concede that O'Coynes was an $86.00 civil suit over a tape recorder that the judge purchased to record District Court proceedings at a time when stenographer when a stenographer was not present. It is not a case of multimillion dollar fiscal and untold political consequences as this one is. And I will say to you before I go further in my argument that we are working on two tiers today. We spent yesterday afternoon, evening and much of

last night preparing not only for this hearing this morning, but preparing a petition for general superintendents under Chapter 211, Section 3, we filed this afternoon, should it be necessary with the single justice of the SJC. And again, this would not be in rancor over an adverse order, if there is an adverse order, it would simply be that perhaps that is the court that must deal with this overriding political, legal and political issue.

But I wanted to get to potential remedies that I think might be a little different than simply, okay, everybody is going to get $60.00 an hour. One of the things we have done at CPCS in recognition of I mean Hampden County just doesn't have as many lawyers as most of the eastern part of the state does. That's one of our fundamental problems, one of the reasons why Hampden tends to be a flat point for public counsel assignment issues. And so we've

devoted a lot of attention to recruiting and training and encouraging, especially newer members of the bar to come and take our training and receive our certification. We've had a lot of success with that.

We also have a bullwork and you know these people very well, of people who shoulder the load in this court and in the Superior Court, who have been working at this for years. Who unlike, perhaps some of the younger attorneys, may have an enormous burden of personal responsibilities and fiscal responsibilities that a younger person, perhaps, doesn't have. Everybody's paid $30.00 an hour.

One of the issues that I want to put on the table this morning and if necessary, this afternoon, is that a judge must have some flexibility. Maybe a judge doesn't need to override a legislative judgment of $30.00 an hour across the board. Perhaps there is a

more nuance or flexible form of relief that would recognize that while some people I think there are probably people listening to me right now, who might step forward for $30.00 an hour and I feel they can't under the current circumstances. But were the circumstances otherwise, and as far as I know, in the other District Courts in Hampden County, people are stepping forward. Certainly of the District Courts around the state they're stepping forward. That some people might be able to do it for $30.00 an hour and some people, the fiscal strain may have just snapped. They just can't do it anymore. Certainly that's what we hear from them constantly. Certainly that's what we communicate to the legislature constantly. And I think one of the I think this rather kind of Gordian knot, if you will, of competing legal principles is not going to be solved perhaps by you know, a bright line

resolution. It may need more nuance, development than that and again, it possibly may need another forum.

The another issue has to do with the custody status of these people. It's a terrible thing for anyone to be at arraignment or post-arraignment, when the most clear cut Constitutional right you possess is your right to a lawyer, and they don't have one. And really I'm not that one. I mean I cannot come out here and interview 19 people and review 19 records and speak to I don't know how many probation officers and prosecutors and then do it again tomorrow and the next day and the next day. I don't know. I'd be fired maybe by Monday. I've got a job to do, I think the court understands that in running the entire agency and fighting the political battles, which I do want to touch upon the current status of the budget, I'm going to touch upon in a minute.

It's a terrible thing to be

deprived of that right, but its worse and the deprivation involves, also, the loss of personal liberty. So in my motion, I ask the Court if it is inclined, after hearing, to deny the motion to assign certified private counsel. I ask that each and every one of these 19 defendants and I can see just from looking at the notice of assignment of counsel, that some may have issues in terms of reporting to Court or at least it appears that way, some may not; that each of those defendants be released on personal recognizance and that the criminal proceedings against them be stayed until such time as counsel until such time as counsel has been appointed or at least until each of these defendants requests for counsel have been finally determined in the appellate process. I don't I think the unfairness is compounded by locking people up and by allowing criminal proceedings to in criminal

investigation, that the development of evidence to go forward against them while they are powerless, completely powerless to respond.

I did want to say a word I'm nearing the end, I'm sorry to be so long-winded about this, but I think it warrants a full discussion. The there was in each of the budgets that have been submitted thus far in the fiscal year of 2005 budget process, there has been a recognition of for the first time in each case, there's a rate to be paid to these lawyers are too low; they are inadequate.

In the governor's budget, there was an outside section, I believe it was Section 297, which authorized me as chief counsel or whoever is chief counsel at the time, to give a bonus to both the public defender staff or CPCS staff attorneys and to private assigned counsel of up to 25% of their annual compensation as a bonus at the end of

the fiscal year. And then of course, "if there's funds available," the government budget fell far short in that regard as, as I have said on many occasions. But that was the first that was the first time a governor had ever submitted a budget that really, at least implicitly recognized the inadequacy.

The house went further on its budget. The house floor, just last week, just less than a week ago, the house passed a new statute, a new Chapter 10, Section 35(Z), capital (Z), creating an indigent counsel, it's actually written that way, indigent counsel salary enhancement trust fund. And it caps that fund at 12 million dollars and authorizes the chief counsel to use that money to enhance hourly rates. And it just so happens that that 12 million, were it funded fully, would provide about a $5.00 increase, it's actually a little over 11 million dollars, we'd calculated it was a $5.00

an hour increase for all cases, all assigned counsel, all over the state in the next coming fiscal year. The problem is, and I've written to all of the legislative leaders about this just Monday, is that the vehicle for creating this fund is a miniscule source of revenue we think. Where we're getting information from the administrative office of the trial court that would firm this up, but the [INAUDIBLE] $15.00 filing fee for private criminal complaint applications. And the best estimate is that it's probably a million or even possibly less, not the 12 million that we need to do the job.

THE COURT: Which may have constitutional issues all of its own.

MR. LEAHY: It may indeed. Yes, exactly, right. And so what I have done on Monday and I'll share this if the court wants to see this documentation, I actually have two sets of documentation, which I will just if the Court wishes,

I'll provide. One is the whole series of correspondence between the Superior Court and myself, it's one-sided, I haven't been able to get a response from the Superior Court Judges, but I've been writing to them and explaining to them what we've been trying to do in our all-out effort to provide counsel to every person who's entitled to it.

The other is my letter on Monday to the senate president, the house speaker and the chairman of the two ways and means committees. In that letter, I ask the senate, in its budget, to fund that new trust fund for the great enhancement. And I asked them to do it essentially by diverting virtually all the counsel fees and also by that would calculate you might get about 7 million of it in FY '05. And then I asked them to find the other 5 million somewhere. I didn't have a so in other words, I did not ask them to rely at all on that new fee as the court suggests, possibly

questionable legality, possible challenge.

So that's right up to the minute in terms of where we are right now. And of course, we're advocating, as soon as I get back to Boston, you know, we're advocating every moment in the senate and in the house for that, for that proposal. I don't suspect that that proposal will satisfy anyone in the private bar. I wouldn't ask anyone to be satisfied with it. It would be $35.00, instead of $30.00 in this court. It might not even solve this court's problem. But it would be measurable progress.

The reason I go into this both to show our good faith and intensity on this, but also to show that there are cracks in the historic neglect, if you will, on the part of the executive and legislative branches, of the need to fund this counsel right. There are cracks, we're trying to, you know as

somebody put it the other day, pour water through those cracks, you know, erosion and slither away, that you'll have some real progress. That's, that's pretty much up to the minute of where we are. And I know I'm putting an awful lot in the lap of the District Court Judge and I'm happy to have the opportunity to speak to you about it.

THE COURT: Well, Mr. Leahy, thank you very much. And it has been helpful. I mean, I know that we went into a history and I think, unfortunately, that this matter is going to come to a head at some point, whether it comes to a head here in the Springfield District Court in the arraignment session today or it comes in Boston in front of a single justice later today or at some point tomorrow or Friday. But it's important that I think the media and others here have an opportunity to listen to what you have to say and to set out this history. But again, this

is an arraignment session in the busiest District Court in the Commonwealth of Massachusetts, which brings with it a whole host of problems.

It's fascinating to listen to what you had to say, but this is basically without sounding too much of a clichI, "where the rubber meets the road," in where we have to deal with all of these people every day. And I happen to be concerned about those individuals that I'm going to see for the third day in a row today who have not had the opportunity to have an attorney appointed. And again, believe me, there's no rancor here at all. I mean, I'm deeply appreciative of you being here, you have, you have locally -- the office is a wonderful office with tremendous attorneys, always very professional. And quite frankly, the bar advocates that appear here every day in the other courtrooms in this building and the other buildings are excellent

attorneys, they do wonderful work under very difficult situations and problems.

But we do have to deal with these issues. And right now, I don't have any attorneys that are willing to accept that sort of an appointment. We've thought about a lot of different things, myself and my colleagues and I'm very grateful to have my colleagues. I just happen to be the person assigned here when everything came to a head. And without the input of my colleagues, I would probably be lost in the wind right now. But we've thought of many ways to try to come up with the remedies as you suggested, suggested. Unfortunately, our remedies need to be immediate; they need to be dealt with today.

And given the fact that we have no attorneys that are willing to accept these appointments, and I understand why and I appreciate why, I understand everything that you have said. I think

any reasonable person understands the importance of what you have described. But pursuant to that, I believe that under the statutory provisions of Chapter 211(D) and under the SJC rules, that if there is no one else, that there are no other competent attorneys willing or able to be appointed, then the appointment rests on the shoulders of CPCS. That's my belief. I believe that's my interpretation of the law.

And again, I'm sure that when people hear me indicating that I'm interpreting the law, there is great dismay, but that's the way, that's the way I interpret the law in this matter.

And therefore, with all due respect sir, I'm going to deny the motions. I'm going to still require CPCS to represent these individuals. And I certainly understand that you're going to you're going to take this up in Boston. And again, I think that's

probably where it needs to be, either in the SJC or in the Federal Court where someone can deal with this but again, I have a deep concern about the fact that I'm seeing these people for the third time. But I also have a deep concern also for the fact that many of these people are charged with very serious crimes. And there are people who are named alleged victims out there. And I have to be concerned about them in my capacity here. I have to be concerned about the fact that there are taxpayers who are, who are undergoing the burden of extra people at the jail. I can't imagine how the jail is dealing with this every day. And there is, there is a series of ramifications that snowball down the hill.

And so, I am deeply appreciative of what you have to say, but and I understand what you say and I certainly look at it, but I'm going to deny the motion that you have filed. Again, I'm

going to continue to hold to the order that the CPCS be assigned to, to these individuals in hopes that we can at least deal with these issues and give those people that are held here a day in court with the counsel as you have so appropriately quoted the Giddeon decision to allow them to have that. And so again, that's where we're going to go with this matter and we'll see what happens today. But I'm going to continue with the order appointing CPCS, which I do, which I believe, again, is based on the provisions of Chapter 211(D) and also the rules of the Supreme Judicial Court.

MR. LEAHY: For the record, if my objections be noted.

THE COURT: Your objections are.

MR. LEAHY: If I could state one other thing.

THE COURT: Yes, sir.

MR. LEAHY: That might, might be modestly helpful in the short term.

I've got a little bit of time here this morning, if I could direct it to the appropriate Assistant District Attorney, perhaps we can canvass these cases that have been sitting here for a day or two. Perhaps there are some that can be resolved, at least to arraignment and bail issues.

THE COURT: I would certainly think so.

MR. LEAHY: And perhaps, a couple more if I think we'll have to see how it goes. You know, if I have, if I have a little bit of time and still can get back for the filing this afternoon and it will be this afternoon, it won't wait --

THE COURT: I --

MR. LEAHY: You know, perhaps I can reappear on a couple of people. We'll see how --

THE COURT: Certainly.

MR. LEAHY: -- I just have no sense of, you know, whether I'd be

wasting the court's time or fairly raising hopes, perhaps. But I'll speak to the prosecutor and see where we can go. It would be helpful to the Court --

THE COURT: Attorney Rock and Attorney Burns are the very capable Assistant District Attorneys assigned to this session. And I'll give you an opportunity to speak with them and we'll see where we go from today. And maybe, maybe the fact that it has come to a head today will cause some decision to be made at a level, at a higher pay grade in either yours or mine.

MR. LEAHY: I share that. Thank you.

THE COURT: Thank you, Mr. Leahy.

COMMONWEALTH OF MASSACHUSETTS

I, RAYMOND F. CATUOGNO, SR., Registered Professional Reporter, do hereby certify that the foregoing testimony, prepared from designated portions of cassettes furnished by the parties herein, is true and accurate to the best of my knowledge and belief.

May 13, 2004 Raymond F. Catuogno, Sr.

Date Raymond F. Catuogno, Sr.

THE SPANGENBERG GROUP

Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial, July 2002[1]

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Alabama	$70	$90[2]	Class A Felony: $3,500 Class B Felony: $2,500 Class C Felony: $1,500	Yes		Code of Alabama §15-12-21 James W. May v. State CR-92-350, AL Court of Criminal Appeals (Oct. 1992-93)
Alaska	$50	$60	Felony disposed following a trial: $4,000 Felony disposed of following a plea of guilty or nolo contendere, or by dismissal - $2,000	Yes		2 AA.C.60 Alaska Administrative Code
Arizona	Varies	Varies	Varies	Yes	Varies	Az. Rev. Stat. Ann. §13-4013(a) grants authority to local court.
Arkansas	non-capital homicide, A and Y felonies: between $70-$90 all other felonies: between $60-$80		None			Arkansas Code Annotated §16-87-2121 authorizes the Public Defender Commission to set the rates.
California	Varies. In San Francisco: $77 for felonies and $92 for serious or life felonies with no maximum				Varies	California Penal Code §98.7.2

[1] This table updates a table originally produced in 1997 and most recently updated in 1999.

[2] Alabama statutory law sets compensation rates at $40/hour for in court work and $60/hour for out of court work. The language in the statute authorizing these rates states, "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." In *James W. May v. State*, the Alabama Court of Criminal Appeals ordered the state to pay an additional amount for overhead as "expenses reasonably incurred." The presumptive hourly overhead is $30 an hour, bringing the typical hourly compensation to $70 an hour out of court and $90 an hour in court.

Prepared for the Bar Information Program of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants by The Spangenberg Group (1001 Watertown Street, West Newton, MA 02465 (617) 969-3820).

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Colorado	Type A Felonies: $51 (violent crimes) Type B Felonies: $47[3] (non-violent felonies)		Felony 1 (trial): $15,000 Felony 2 (no trial): $7,500 Felony 2 (trial): $7,500 Felony 2 (no trial): $3,750 Felony 3 (trial): $5,000 Felony 3 (no trial): $2,500	Yes		Rates set by Chief Justice Directive 97-01, per Colorado Revised Statutes §21-2-105[4]
Connecticut	$45	$65	If a case is not at trial an attorney may bill for 6 hours in court and 6 hours out of court per day.			Appointed Counsel rates are set by the State Public Defender and approved by the Public Defender Commission pursuant to §51-293 C.G.S., established in accordance with C.G.S.§51-291(12).
Delaware	$50[5]		None			Delaware Code Annotated 29 §4605 grants authority to Supreme Court.
State	**Hourly Rate**		**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court	**In Court**				
D.C.	$50	$50	$2,450[6]	Yes		D.C. Code Ann. Sec. 11-2604(a)
Florida	Varies		Non-Capital, non-life felonies: $2,500; Life felonies: $3,000	Yes		Florida Statutes §925.036 grants authority to set

[3] Travel time is paid at $30 per hour with an additional $0.28 paid per mile.

[4] In January of 1997 the Colorado Alternate Defense Counsel was established. This agency provides legal representation in cases presenting conflicts of interest for the State Public Defender system. Participating attorneys enter contacts with the Alternate Defense Counsel but receive appointments and payment like court-appointed counsel as opposed to contract counsel.

[5] The majority of the public defender conflict of interest cases are handled by contract counsel. The $50 hourly rate applies only to attorneys not on contract.

[6] In addition to a per-case cap, no attorney may earn more than $96,000 annually from court appointments in the District of Columbia.

						hourly rates to Chief judge or Senior judge of the circuit.[7]
Georgia	$45	$60[8]	None			Georgia Code Annotated §17-12-5 grants authority to local court. The supreme court has established guidelines for the operation of local indigent defense systems to be adhered to as a condition for receiving GIDC funding.
Hawaii	$40	$60	$3,000	Yes		H.R.S. § 802-5(b)
Idaho	Varies. Typical: $50		None			Idaho Code §19-860(b) grants authority to local judge.
State	**Hourly Rate**		**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court	**In Court**				
Illinois	$30	$40	$1,250	Yes		I.L.C.S. 5/113-3(c)
Indiana	$60[9]		None			IND. CODE §33-9-13-3 Establishes the Indiana Public Defender Commission. Rates are set by Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases
	Felony punishable by life		Felony punishable by life			I.G.S. sets the

[7] In 2003 all costs associated with indigent defense will be assumed by the state.

[8] Hourly rates apply to the counties that meet GIDC Standards.

[9] Rate applies to those counties that meet Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases.

Iowa	w/out parole: $60 $60 Felony punishable by 25 years to life: $55 $55 Other: $50 $50		w/out parole: $15,000 Felony punishable by 25 years to life: $3,000 Felony punishable by 10 years: $1,200 Felony punishable by 5 years: $1,000	Yes		rates. I.G.S. §13.B.4(3) grants the State Public Defender authority to contract with attorneys, and State Public Defender Admin. Rules set out fee limitations.
Kansas	$50	$50	$5,000	Yes		K.S.A. 22-4501 et. seq. grants authority to Kansas State Board of Indigents' Defense Services.
State	**Hourly Rate**		**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court	**In Court**				
Kentucky	Non-violent felonies: $40 Violent felonies subject to 85% parole eligibility: $50		Non-violent felonies: $1,800 Violent felonies subject to 85% parole eligibility: $3,000	Yes		K.R.S. Ann. 31.170(4)
Louisiana	Varies; $42 is typical rate.		None			La. Code Crim. Proc. Sec. 15-144 et. seq.
Maine	$50	$50	Class A: $2,500 Class B/C against a person: $1,875 Class B/C against property: $1,250	Yes		Maine Revised Statutes Annotated Title 15 §810 grants authority to Superior Court.
Maryland	$30	$35	$1,000	Yes		Annotated Code of Maryland Art.27 §6(d) grants Public Defender authority to promulgate administrative law.
Massachusetts	No distinction between in and out of court rates. $54: murder cases $39: superior court felonies and youthful offender cases $30: all other criminal cases.		None			Massachusetts General Laws Annotated Chapter 211D §11 grants authority to Committee for Public Counsel Services; must get legislative

					approval of rates.
Michigan	Varies widely	Varies			Michigan Compiled Laws Annotated §775.16 grants authority to presiding judge.
State	**Hourly Rate**	**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court / **In Court**				
Minnesota	$50 / $50[10]	None			No official authority; Public Defender establishes rates.
Mississippi	Varies from county to county.	$1,000 plus overhead expenses, which are presumptively set at $25 per hour.	No		Miss. Code Ann. §99-15-17. *Wilson v. State*, 574 So.2d 1338 (1990)
Missouri	Rarely Used.	None			Mo. Rev. Stat. Sec. 600.017 grants authority to State Public Defender.
Montana	Varies. Typically $40-$60 for both in court and out of court work	None			Montana Code Ann. §46-8-201(1) grants authority to local judge.
Nebraska	Varies. Typical: $60 / $60 Omaha: $65 / $80	Typically there is no maximum, but Omaha uses $12,000	Yes		Nebraska Code 29-1804.12 grants authority to local judge.
Nevada	$75	$1,2000 facing life without the possibility of parole $2,500 if facing less than life without parole	Yes		N.R.S. 7.125
State	**Hourly Rate**	**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court / **In Court**				

[10] The majority of the public defender conflict of interest cases are handled by contract counsel. Hourly rate applies only to attorneys not on contract.

New Hampshire	$60	$60	$3,000	Yes		Part 2 Art. 73A of New Hampshire Constitution grants authority to State Supreme Court.
New Jersey	$25	$30	None			N.J.S.A. §2A: 158A-7 grants authority to the New Jersey Public Defender.
New Mexico	Rarely Used.					New Mexico Statutes Annotated §31-15-7(11) authorizes Chief Public Defender to formulate a fee schedule.
New York[11]	$25	$40	$1,200	Yes		Article 18-B of the County Law §722-b
North Carolina	$65		None			General Statutes of North Carolina §7A-498.5 grants authority to the Office of Indigent Defense Services.
State	**Hourly Rate**		**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court	**In Court**				
North Dakota	Varies Typical: $60-$85		None			North Dakota Supreme Court's Advisory Commission on Indigent Defense
Ohio	Varies. Average rate paid in FY 2000 was $49 per hour. Public Defender Standards recommend: $50	$60	Public Defender Commission recommends: Aggravated Murder: $8,000 (1 attorney), $10,000 (2 attorneys); Murder and Felony w/ possibility of life sentence/repeat Violent Offender/Major Drug Offender: $5,000; Felonies (degrees 1-3): $3,000;	Yes		Ohio Revised Code Annotated §120.33 grants local board of county commissioners authority to set rate after soliciting local bar association for

[11] Per preliminary injunction, compensation rates for court-appointed attorneys in New York City are $90/hour for all work in and out of court, with no cap. *New York City Lawyers' Association v. State of New York*, County of New York, Index no. 102987/00- LAS Part 38 (May 3, 2002). A verdict is forthcoming.

			Felonies (degrees 4&5): $2,500 .			proposed rate schedule.[12]
Oklahoma	$40	$60[13]	$3,500[14]	Yes		22 O.S. § 1355.8 G2 (OSCN 2001).
Oregon	$40	$40	None			O.R.S. §151.430(5) grants authority to State Court Administrator, O.R.S. Ann. 135.055

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Pennsylvania	Varies from $40-$75 per hour. Philadelphia County pays on a per diem basis.		Varies		Varies	Pennsylvania Statutes Annotated Article 13A §9960.7 grants authority to local judge.
Rhode Island	If potential sentence is greater than 10 years: $50 $50 If potential sentence is less than 10 years: $35 $35		If potential sentence is less than 10 years: $5,000. If potential sentence is less than 10 years: $2,500	Yes		General Laws of the State of RI §8-15-2 vests authority w/ Chief Justice. Supreme Court Executive Order No. 95-01
South Carolina	$40	$60	$3,500	Yes		Code of Law of S.C. Ann. §17-3-50
South Dakota	$67	$67	None			S.D.C.L. §23A-40-8[15]

[12] Ohio Revised Code Annotated §120.04(7) authorizes State Public Defender to set rates at which Ohio Public Defender Commission will reimburse counties.

[13] In cases not under contract with Oklahoma Indigent Defense System and outside of Tulsa and Oklahoma counties.

[14] Ibid.

[15] The source of authority for this rate is a supreme court rule. In South Dakota supreme court rules are incorporated into the state code.

Tennessee	$40	$50	$1,000	Up to $3,000[16]		Supreme Court Rule 13

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Texas	Varies from $50-$125 per hour		Varies widely			Texas Statutes Annotated Art. 26.05 grants authority to local judge.[17]
Utah	Varies					Utah Code Annotated §77-32-3(3) grants authority to district court.
Vermont	$50	$50	Felony involving life in prison: $25,000 Major felony: $5,000 Minor felony: $2,000	Yes		13 V.S.A. §5205(a) and administrative order of the Vermont Supreme Court.
Virginia	$90	$90	$1,235 to defend charges punishable for more than 20 years; $445 to defend other felony charges.[18]	No		Code of Virginia §19.2-163(a) establishes maximum per case payments. Pursuant to §2.1-

[16]The $3,000 maximum may be waived in a homicide case if the Chief Justice finds that extraordinary circumstances exist and the failure to waive the maximum would result in undue hardship.

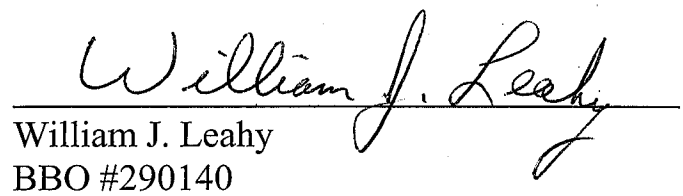
[17]The Texas Task Force on Indigent Defense, created in 2001, will establish standards for the operation of local indigent defense systems that counties will be required to follow. Among these standards is expected to be a minimum rate of compensation for court appointed counsel.

[18] Though by statute the per case maximums are set at $1,235 and $445, the Virginia Legislature has not appropriated funds sufficient to pay court appointed counsel at this level. Thus the Virginia Courts have scaled down the per case maximum they will pay attorneys proportional to the funding the legislature has appropriated. As a result the per case maximums are, in practice, $1,096 for felonies punishable by more than 20 years and $395 for cases punishable by less than 20 years.

						204, the Supreme Court of Virginia establishes hourly rates.
State	**Hourly Rate**		**Per Case Maximum**	**Is Maximum Waivable?**	**Flat Fee**	**Authority**
	Out of Court	**In Court**				
Washington	Varies from $40-$80 Pierce County: $40-$50 Lincoln County: $40 Stevens County: $70		Varies, e.g., Pierce County: $550-$1000 for cases that don't go to trial; $,1500-$5,000 for trials	Varies	Varies	Revised Code of Washington Annotated §36.26.090 grants authority to court.
West Virginia	$45	$65	$3,000	Yes		West Virginia Code Ann. §29-21-13a
Wisconsin	$40 plus $25 per hour for travel	$40	None			Wisconsin Statutes Annotated §977.08(4m)
Wyoming	$25-$50		None			Wyoming Rules of Criminal Procedure Rule 44(e)
U.S. Government	$90	$90	$3,500	Yes		18 U.S.C. §3006 A(d)

CERTIFICATE OF SERVICE

I, William J. Leahy, do hereby certify that on this 20th day of May, 2004, I served copies of the foregoing Motion for Immediate Relief and Memorandum in support thereof, by hand delivery, to the offices of Ronald Kehoe, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108.



William J. Leahy
BBO #290140
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212